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No. 804

In the

Supreme Court of the United States

OCTOBER TERM, 1948

MISSOURI–KANSAS–TEXAS RAILROAD COMPANY OF TEXAS,
Petitioner,

v.

UNITED STATES OF AMERICA, EX REL, JEWELL G. DEAVERS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT IN CAUSE NO. 12223, ENTITLED "UNITED STATES OF AMERICA, EX REL, JEWELL G. DEAVERS VERSUS MISSOURI, KANSAS AND TEXAS RAILROAD COMPANY".

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To the Honorable, the Supreme Court of the United States:

Petitioner, Missouri-Kansas-Texas Railroad Company of Texas, erroneously styled "Missouri, Kansas and Texas Railroad Company" in the courts below, respectfully requests this Court to review on writ of certiorari the opinion and judgment of the United States Court of Appeals for the Fifth Circuit in Cause No. 12223, entitled "United States of America, ex rel, Jewell G. Deavers versus Missouri, Kansas and Texas Railroad Company".

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED

This is an action under Section 8 of the Selective Training and Service Act of 1940, as amended [50 U. S. C. A., War, Appendix, Sec. 308].

Purporting to act under paragraph (e) of that section of the Act, the United States Attorney for the Western District of Texas brought this suit in the name of the United States, ex rel, Jewell G. Deavers (R. 2, 5). The Court of Appeals has suggested that, if "the proceeding should properly be in the name of Deavers" under Rule 17(a) of the Federal Rules of Civil Procedure, this error can be corrected by amendment so that the complaint "will stand in the name of the real party in interest", *171 F. (2d) 962*.

It was alleged that relator left the service of defendant railroad company on January 7, 1942, to enter military service; that relator then had a seniority status superior to one D. H. Penton; that relator was honorably discharged on December 30, 1943; that relator, on January 9, 1944, sought re-employment by defendant with a seniority status superior to D. H. Penton; that relator, on January 9, 1944, was re-employed by defendant with a seniority status inferior to D. H. Penton; and that defendant has refused to give relator a seniority status superior to D. H. Penton (R. 5-6). Relator therefore prayed that the Court "assign relator to a seniority status * * * superior to that of said D. H. Penton" (R. 7).

Defendant moved to dismiss the complaint (R. 7-12) for failure to state a claim upon which relief can be granted, alleging in effect that,—

(1) D. H. Penton is a necessary and indispensable party because a judgment in favor of relator would deprive Penton of a seniority status superior to relator (R. 7-8);

(2) Eighty-nine other firemen are necessary and indispensable parties because a judgment in favor of relator would deprive each of them of a seniority status superior to relator (R. 8-11);

(3) The Brotherhood of Locomotive Firemen and Enginemen and its Ivanhoe Lodge No. 492 are necessary and indispensable parties because the seniority status of relator Jewell G. Deavers, D. H. Penton, and the other eighty-nine firemen, is dependent upon an agreement between defendant and the Brotherhood of Locomotive Firemen and Enginemen (R. 11);

(4) This action was instituted April 16, 1947 (R. 4) more than one year after December 30, 1943, when relator was honorably discharged, and more than one year after January 9, 1944, when relator applied for reinstatement with a seniority status superior to D. H. Penton (R. 12); and

(5) The Court has no jurisdiction over the subject matter (R. 12).

In passing upon defendant's motion to dismiss, the District Court found that plaintiff had admitted, among other things, that:

(a) "D. H. Penton at present has a seniority status superior to that of plaintiff" (R. 14);

(b) "D. H. Penton has not been joined as a party to this cause" (R. 14);

(c) "the firemen listed in paragraph II of defendant's motion to dismiss all have at present a seniority status superior to that of the plaintiff" (R. 14);

(d) "an agreement heretofore made between the defendant and the Brotherhood of [Locomotive] Firemen and Enginemen is an issue in this case" (R. 14); and

(e) "plaintiff believes it true that a judgment for plaintiff and against the defendant employer would adversely affect the interest" of the suggested additional parties "who are firemen with a present seniority status superior to that of plaintiff" (R. 14-15).

After making the foregoing findings, the District Court concluded:

> "In view of the accord between the parties as to the adverse effect the successful prosecution of Deavers' claim would have upon the seniority status of D. H. Penton and the other firemen named in the motion, the Court concludes that each is a necessary party to this cause" (R. 15).

The District Court also held, however, that Rule 21 of the Federal Rules of Civil Procedure "would not require this cause to be dismissed, but rather that the persons above referred to be made parties" (R. 15).* Accordingly, the Court on September 4, 1947, overruled the motion to dismiss "provided the persons hereinabove referred to as necessary parties are made parties to this cause" (R. 15).

Plaintiff "failed and refused to make said persons parties" and therefore the cause was dismissed on November 7, 1947 (R. 16).

* The District Court also held that the failure of Deavers to bring his action within one year was not a ground for dismissal of his complaint (R. 15).

The Court of Appeals reversed and remanded, after concluding that "the case is between the veteran and his employer alone, and that no one else need be made a party for the limited relief" provided by Section 8(e) of the Selective Training and Service Act, *171 F. (2d) 963.* In reaching this conclusion, the Court of Appeals also held:

> "The subject matter is solely seniority under a collective bargain between a railroad company and its employees, evidently made pursuant to the Railway Labor Act", *171 F. (2d) 962.*

> "The policy and effect of the Railway Labor Act is to submit such controversies to the Mediation and Adjustment Boards established by the Act, excluding the courts until the proper Board has acted", *171 F. (2d) 963.*

> "Deavers here is not suing to be reëmployed, nor to be made whole for a monetary loss, but to have his seniority status recognized. He has a grievance against his employer. If he is accorded what he asks, Penton and the others who are displaced may have a grievance also. These grievances are normally to be weighed and the right of them established by the Adjustment Board, the courts being initially excluded. But the grievance of Deavers, at least for one year, has a special standing as respects court action under Section 8, supra. The court must, if prerequisites are shown by him, specifically require his restoration to his former 'position or to a position of like seniority, status, and pay'. He already has his former position and is not complaining about his pay. He wishes only a seniority which he says is now, after several years, not accorded him. We do not think Section 8 is to be construed as substituting the court for the Adjustment Board in settling the cross grievances arising among these railroad employees. The Court's duty is to ascertain the facts as to the veteran's former employment, his entrance into the military service and proper discharge

therefrom, his timely application for restoration, and whether he has a right to have his former employment with due seniority, *as against his employer*. That much it can settle. Disputes between him and fellow employes as to what his seniority is as against them must take their usual course, especially when thus belatedly raised. The Adjustment Board, it may be presumed, will give effect to the judgment of the court, if so rendered, that Deavers was and is as a veteran entitled to full restoration as to seniority, but the Board can better determine what in detail that seniority was and is, and how it is to be effected under the collective agreement with the firemen", *171 F. (2d) 963*.

"It follows that the Union and fellow employees, if not made parties will not be bound as to their particular interests, which belong primarily to the jurisdiction of the Adjustment Board, and they may be heard there. In the present case, the employer may, on the facts proven, be required to put Deavers' name on the Firemen's Board ahead of Penton, but the requirement ought to be without prejudice to the Board's authority to make decisions on resulting grievances if any are presented to it", *171 F. (2d) 963*.

If for no other reason this Court should grant certiorari to prevent the confusion, chaos, inequity, and multiplicity of actions which would follow an attempt to comply with these pronouncements. Summarized, they may thus be stated:

(a) Seniority of a railroad employee has a dual status: (1) seniority against employer; and (2) seniority against fellow employees;

(b) The District Court must determine relator's seniority "as against his employer" but the Adjustment Board must determine his seniority as against his "fellow employees";

(c) If the District Court holds that relator is entitled to seniority superior to Penton and the other eighty-nine firemen, it is presumed that the Adjustment Board "will give effect to the judgment" which should be "without prejudice to the Board's authority to make decisions on resulting grievances" because "the Board can better determine what in detail that seniority was and is, and how it is to be effected under the collective agreement"; and

(d) If the judgment of the District Court grants relator seniority superior to Penton and the other eighty-nine firemen "who are displaced", they may have a grievance against the defendant railroad company but, not being parties, they "will not be bound as to their particular interests, which belong primarily to the jurisdiction of the Adjustment Board".

Expressed in the simplest form, and reduced to railroad language, the Court of Appeals has held that the District Court can compel the railroad defendant to place relator's name on the firemen's board ahead of Penton and the other eighty-nine firemen, which means that relator must be called for service ahead of those persons, and that the Adjustment Board can then decide whether or not said defendant must pay each of those persons a runaround claim every time relator is so used. This, of course, would subject defendant to potential damages totaling many thousands of dollars,* which could be avoided if Penton and

* See Awards Nos. 10495 and 10496, Docket Nos. 19276 and 19278, First Division, National Railroad Adjustment Board, sustaining claims against the Great Northern Railway Company, which Company "actually paid out $2,253,200 for the runaround portion of the awards", Volume No. 28, page 1723, Transcript of Proceedings (March 4, 1948) of Emergency Board No. 57, appointed by the President of the United States to investigate and report on certain differences between the Akron, Canton & Youngstown Railroad and Other Carriers and Brotherhood of Locomotive Engineers, Brotherhood of Locomotive Firemen and Enginemen, and Switchmen's Union of North America.

the other eighty-nine firemen were made parties and if their seniority rights as well as those of relator were determined in this action.

JURISDICTIONAL STATEMENT

This Court is authorized by Section 1254 of Title 28 of the United States Code to review on certiorari the judgment of the Court of Appeals. That section reads in part as follows:

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> "(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree * * *".

The judgment of the Court of Appeals was rendered on January 18, 1949. A timely petition for rehearing was denied on February 21, 1949, and this petition for a writ of certiorari will be filed "within ninety days" thereafter as required by paragraph (c) of Section 2101 of Title 28 of the United States Code. *Gypsy Oil Company v. Leo Bennett Escoe, a Minor, by O. W. Stephens, Guardian, 275 U. S. 498-499; Department of Banking of Nebraska, Receiver v. Pink, Superintendent of Insurance of the State of New York, 317 U. S. 264, 266.*

QUESTIONS PRESENTED

The following questions are presented by the record in this case:

1. Are D. H. Penton and the other eighty-nine firemen, who have a present seniority status superior to rela-

tor Jewell G. Deavers (R. 14), who relator admits would be adversely affected by a judgment in his favor (R. 14-15), and who would be displaced if relator prevails [171 F. (2d) 963], necessary or indispensable parties to this action?

2. Are D. H. Penton and the other eighty-nine firemen, who may have grievances against the defendant if a judgment is rendered for relator [171 F. (2d) 963], and who may submit those grievances for decision by the National Railroad Adjustment Board [171 F. (2d) 963], necessary or indispensable parties to this action?

3. Did the District Court have power and authority to dismiss this cause (R. 16) for the failure and refusal of relator to make D. H. Penton and the other eighty-nine firemen parties to this action?

4. Are the Brotherhood of Locomotive Firemen and Enginemen, party to an agreement which "is an issue in this case" (R. 14), and its Ivanhoe Lodge No. 492, necessary or indispensable parties to this action?

5. In this proceeding under Section 8 of the Selective Training and Service Act (50 U. S. C. A., War, Appendix, Sec. 308), which directs the District Court "to specifically require" an employer to restore a veteran, without loss of seniority, to his position or to a position of like seniority, status and pay, must the District Court itself determine the seniority status of relator or can that duty be transferred to the National Railroad Adjustment Board upon the theory that it "can better determine what in detail that

seniority was and is, and how it is to be effected under the collective agreement" [171 F. (2d) 963]?

6. If D. H. Penton and the other eighty-nine firemen were made parties to this action, would the District Court have power and authority to determine the seniority rights of such persons who have a present seniority status superior to relator (R. 14), who relator admits would be adversely affected by a judgment in his favor (R. 14-15), and who would be displaced if relator prevails [171 F. (2d) 963]?

7. Does the National Railroad Adjustment Board have power and authority to settle disputes between relator, D. H. Penton, and the other eighty-nine firemen, "as to what his seniority is as against them" [171 F. (2d) 963]?

8. Does the complaint state a cause of action against the defendant railroad company?

9. In an action by a veteran to establish his seniority under Section 8(e) of the Selective Training and Service Act, is there a justiciable controversy between the veteran and his employer or is the real and only justiciable controversy between the veteran and his fellow employees who would be displaced and adversely affected by a judgment in his favor?

10. In a proceeding under Section 8(e) of the Selective Training and Service Act, can a railroad defendant be compelled by a judgment to give a veteran the seniority which he claims and then be subjected, as a result of complying with said judgment, to possible awards of the National

Railroad Adjustment Board upon claims by the veteran's fellow employees who would be displaced and adversely affected by compliance with said judgment?

11. Does a veteran have, as stated by the Court of Appeals [171 F. (2d) 963], a dual seniority, that is, (1) seniority as "against his employer" and (2) seniority as against his "fellow employees"?

12. In a proceeding by a veteran to establish his railroad seniority under Section 8(e) of the Selective Training and Service Act, is such veteran entitled to a judgment determining (a) "what in detail that seniority was and is, and how it is to be effected" under a collective agreement, and (b) "what his seniority is as against" his fellow employees, or can the Court send such veteran to the National Railroad Adjustment Board for a determination of either or both of these questions?

13. In an action by a veteran to establish his seniority under Section 8(e) of the Selective Training and Service Act, should the parties to such action be limited to the veteran plaintiff and the employer defendant?

14. In an action by a veteran to establish his seniority under Section 8(e) of the Selective Training and Service Act, should the veteran plaintiff be required to make parties to the action (a) the veteran's fellow employees who would be displaced and adversely affected by a judgment in his favor, and (b) a labor union, which negotiated an agreement made an issue in the case (R. 14), and its local lodge?

15. May a veteran, seeking to establish his seniority under Section 8(e) of the Selective Training and Service Act, institute an action against his employer more than one year after such employer has refused to accord to such veteran the seniority demanded by him?

REASONS RELIED UPON FOR ALLOWANCE OF WRIT

It is respectfully submitted that this petition for a writ of certiorari should be granted for each and all of the following reasons:

I

The decision of the Court of Appeals for the Fifth Circuit in this case is in conflict with the decision of the Court of Appeals for the Tenth Circuit in *Johnson v. Interstate Transit Lines, 163 F. (2d) 125.*

In this proceeding, the Court of Appeals has held that "the case is between the veteran and his employer alone, and that no one else need be made a party for the limited relief" provided by Section 8(e) of the Selective Training and Service Act, *171 F. (2d) 963.* This excludes D. H. Penton and the other eighty-nine firemen, fellow employees of relator, who have a present seniority status superior to relator Deavers (R. 14), who relator admits would be adversely affected by a judgment in his favor (R. 14-15), who would be displaced if relator prevails [171 F. (2d) 963], and who, according to the Court of Appeals, may submit their grievances to the National Railroad Adjustment Board for decision [171 F. (2d) 963].

In the *Johnson case*, a suit for declaratory judgment to establish a veteran's "seniority rights" and "bottomed on the Selective Training and Service Act" [163 F. (2d) 127, 128], the Court of Appeals for the Tenth Circuit held that "the real controversy which the court is asked to adjudicate is not between the appellant (Johnson) and the Company" [163 F. (2d) 129]; that "it is of no particular concern to the Company whether appellant's seniority dates from the first day of his first application and probationary period, or from the first day of the second application and second probationay period" [163 F. (2d) 129-130]; that "this question is of vital importance to those employees, if any, who came in while appellant was in the service" [163 F. (2d) 130]; that "they are the ones who have rights antagonistic to those claimed by the appellant" [163 F. (2d) 130]; that "the real and only justiciable controversy is between him and them, and they are not before the court" [163 F. (2d) 130]; that there is no one "before the court in this case with authority to represent them so that a judgment in the case would bind them" [163 F. (2d) 130]; that "those employees, if any, who came in while appellant was in the service, are the real parties in interest opposed to him" [163 F. (2d) 130]; that "what appellant sought was a declaration of the court that he had seniority rights superior to their rights" [163 F. (2d) 130]; that "they are not parties to the action and in their absence therefrom such a judgment would not bind them, and would lack that finality which entitles one to proceed under the Declaratory Judgment Act" [163 F. (2d) 130]; and that "under these circumstances, the trial court did not abuse

its discretion in refusing to entertain the action" [163 F. (2d) 130].

II

The Court of Appeals has decided nine important questions of federal law which have not been, but which should be, settled by this Court, namely:

(1) In a proceeding under Section 8(e) of the Selective Training and Service Act, "the case is between the veteran and his employer alone" and "no one else need be made a party" [171 F. (2d) 963], not even other employees who have a present seniority status superior to the veteran (R. 14), who the veteran admits would be adversely affected by a judgment in his favor (R. 14-15), who would be displaced if the veteran prevails [171 F. (2d) 963], and who, according to the Court of Appeals, may submit their grievances for decision by the National Railroad Adjustment Board [171 F. (2d) 963].

(2) In a proceeding under Section 8(e) of the Selective Training and Service Act, a labor union, which negotiated an agreement made an issue in the case (R. 14), and its local lodge, are not necessary or indispensable parties to the action.

(3) In a proceeding under Section 8(e) of the Selective Training and Service Act, a District Court may require a railroad company to give a veteran the seniority position which he claims but the National Railroad Adjustment Board must "determine what in detail that seniority was and is, and how it is to be effected" under a collective agreement [171 F. (2d) 963].

(4) A veteran under the Selective Training and Service Act, who is a railroad employee under the Railway Labor Act, has one seniority as "against his employer" and another seniority as against his "fellow employees" [171 F. (2d) 963].

(5) A railroad defendant subject to the Railway Labor Act, in a proceeding under the Selective Training and Service Act, can be compelled by judgment to give a veteran the seniority which he claims and then be subjected to possible awards of the National Railroad Adjustment Board on claims by the veteran's fellow employees who have a present seniority status superior to the veteran (R. 14) and who would be displaced and adversely affected by a judgment in his favor [171 F. (2d) 963].

(6) A veteran seeking to establish his railroad seniority under Section 8(e) of the Selective Training and Service Act must go to the National Railroad Adjustment Board for its decision (a) as to "what in detail that seniority was and is, and how it is to be effected" under a collective agreement, and (b) as to "what his seniority is as against" his fellow employees.

(7) The National Railroad Adjustment Board has jurisdiction over, and power to decide, "cross grievances" arising among railroad employees, and disputes between a veteran railroad employee and his fellow employees "as to what his seniority is as against them" [171 F. (2d) 963].*

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* Jurisdiction of the National Railroad Adjustment Board is limited by statute to "disputes between an employee or group of employees and a carrier or carrier" [45 U. S. C. A. Sec. 153 (i)].

(8) An action by a veteran to establish his seniority under Section 8(e) of the Selective Training and Service Act presents a justiciable controversy between the veteran and his employer but does not present a justiciable controversy between the veteran and his fellow employees who would be displaced and adversely affected by a judgment in his favor.

(9) A veteran seeking to establish his seniority under Section 8(e) of the Selective Training and Service Act may institute an action against his employer more than one year after such employer has refused to accord such veteran the seniority which he claims.

III

The decision of the Court of Appeals that the disputes between relator and his fellow employees "as to what his seniority is as against them must take their usual course" to the National Railroad Adjustment Board [171 F. (2d) 963], is in conflict with the decision of this Court in *Moore v. Illinois Central R. Co., 312 U. S. 630*, in which it was held that a discharged railroad employee was not required by the Railway Labor Act to take his grievance to the National Railroad Adjustment Board because:

> "* * * neither the original 1926 Act, nor the Act as amended in 1934, indicates that the machinery provided for settling disputes was based on a philosophy of legal compulsion. On the contrary, the legislative history of the Railway Labor Act shows a consistent

purpose on the part of Congress to establish and maintain a system for peaceful adjustment and mediation voluntary in its nature" (pages 635-636).

IV

The Court of Appeals in this case has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

The Court of Appeals has declared that D. H. Penton and the other eighty-nine firemen, fellow employees of relator, who have a present seniority status superior to relator (R 14), who relator admits would be adversely affected by a judgment in his favor (R. 14-15), who would be displaced if relator prevails [171 F. (2d) 963], and who, according to the Court of Appeals, may submit their claims against the defendant railroad company to the National Railroad Adjustment Board for decision [171 F. (2d) 963], are not necessary and indispensable parties to this action.

The Court of Appeals has also declared that the Brotherhood of Locomotive Fireman and Enginemen, which negotiated an agreement made an issue in this case (R. 14), and its Ivanhoe Lodge No. 492, are not necessary or indispensable parties to this action.

In so holding, the Court of Appeals has departed from the principles announced by this Court in *Shields, et al. v.*

Barrow, 58 U. S. 129, to the effect that the following persons should be made parties to an action:

> "Persons having an interest in the controversy, and who ought to be made parties, in order that the court may act on that rule which requires it to decide on, and finally determine the entire controversy, and do complete justice, by adjusting all the rights involved in it. * * * Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience" (page 139).

To the same effect is Rule 19 of the Federal Rules of Civil Procedure.

WHEREFORE, petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the United States Court of Appeals for the Fifth Circuit, commanding that Court to certify and send to this Court a full and complete transcript of the record and proceedings of said Court of Appeals in the case on its docket numbered 12223, entitled "United States of America, ex rel, Jewell G. Deavers, Appellant, versus Missouri, Kansas and Texas Railroad Company, Appellee", to the end that said cause may be reviewed and determined by this Court as provided by the statutes of the United States; that the judgment of said Court of Appeals be reversed; that the judgment of

the District Court be affirmed; and for such other and further relief as this Court may deem proper.

Dated May 19, 1949.

Respectfully submitted,

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